U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

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Date: June 12, 1998

CASE NO.: **97 INA 305**

In the Matter of:

SHIRLEY'S CARE HOME, #3
Employer

on behalf of

CARLO CORBILLON,
Alien

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of CARLO CORBILLON ("Alien") by SHIRLEY'S CARE HOME, #3 ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, and the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On September 9, 1994, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Household Domestic Worker/Practical Nurse" in the Employer's "Residential Care Home for developmentally disabled." AF 63. The Employer described the job duties as follows:

> Clean house, (10 rms.); prepare and serve meals, wash-dy-iron clothes and linens; handwash soft clothes; monitor activities of developmentally-diabled retarded; incontinent adults; washdishes, assist with bed bath, shower, sponge bath, tub bath; ambulating, exercising, shaving, hair care; asist with medications; provide oral care, bowel care, skin care; vacuum, change bed linens; straighten rooms; change diapers; document progress of clients.

AF 63 (Quoted verbatim without change or correction.) The hours were 3:00 PM to 12:00 AM in a forty hour week at $700 per month plus overtime at time and a half as needed. The position was classified under DOT Occupational Code No. 355.674-014, as a Nurse Assistant. The Employer required four years of high school, and three months of experience in the Job Offered. The Other Special Requirements were the following:

> If hired: Must speak, read, and write English
> Must have legal right to work
> Must have First Aid, CPR Certificate, Health Screening Report issued by the State of California and Welfare Agency
> Must be willing to be fingerprinted to be sent to the Dept. of Justice
> Must know food preparation, food storage, menu planning.

AF 63. (Quoted verbatim without change or correction.) No U. S. worker responded to the recruitment advertisement, and none was hired in the Employer's recruitment effort to test the labor market under the Act. AF 60-61.

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

Notice of Findings. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") of August 28, 1996. AF 55-59.

1. The CO found that the Employer's hiring criteria were restrictive under 20 CFR § 656.21(b)(2)(ii) in that it required a combination of duties that did not appear in any single DOT description. The CO further found that the Employer's job requirements were restrictive under 20 CFR § 656.21(b)(2)(i)(A) because it also required that the job candidates be willing to be fingerprinted for the purposes of checking for the existence of a criminal record as a condition of their being hired.

Based on 20 CFR § 656.21(b)(2)(ii), the CO said that the Employer's description of the job duties combined the work of a Household Domestic Worker, a Practical Nurse, and the Security function. The CO explained that under the DOT a Nurse Assistant/Aide serves and collects food, meals, and food trays and feeds patients requiring help. The Employer, however, also requires that the Nurse Assistant "Must know food preparation, food storage, and menu planning," work skills that are beyond the functions required of a Nurse Assistant by the DOT. Although under the DOT definition of this job a Nurse Assistant is required to dust and clean the patients' rooms, workers in this position do not perform the general household work Employer demanded in the Form ETA 750A, which included clean house, wash , dry, iron clothes and linens, handwash soft clothes, wash dishes, or vacuum. Also, the CO distinguished and rejected Employer's proposed application of a State manual to the DOT delineation of the duties of a Nurse Assistant, who neither plans menus nor prepares meals. Finally, the CO rejected Employer's requirement that the worker live on the premises "provide security for the residents, who cannot be left by themselves," since performing security functions for sole purpose of protecting the residents is not common to the duties of a Nurse Assistant. AF 56-57.[3]

Under 20 CFR § 656.21(b)(2)(i)(A) the CO then said the Employer is not permitted to make the fingerprinting of the candidates a condition of hiring, as there is no evidence that nursing assistants in residential care homes are normally subjected to this practice, and that the requirement might discourage qualified U. S. workers from applying for the job. By way of rebuttal the Employer was told (1) to delete such hiring criteria and to retest the labor market, (2) to document that these restrictive requirements are common for this occupation, or (3) to justify the business necessity of the job requirements that the CO rejected.

2. The CO also addressed the incongruity of Employer's assertion that no overtime was required for this job in Item 10b of Form ETA 750A in the context of its further statement that the worker must be "on call 24 hours a day" for the reasons discussed in Employer's letter of November 15, 1994. The CO then quoted Employer's assertion that, "It is essential that

[3]While "security" may have lacked logic as a "job duty," its presence in this context can be explained as laying a foundation for the Employer's proof of the business necessity of a "live in" requirement. At this point it seems that the Employer's preemptive expression of this requirement that the worker also perform "security" duties made its live-in requirement an issue in this case.

a caregiver is available during these hours to respond to personal needs of the residents, who all need round-the-clock care." The CO said,

> This indicates to us there is a possibility the alien will be required to work overtime, which would be any time beyond his scheduled hours of 3:00 p.m. to 12 midnight. The Employment Contract does state, 'Alien may work overtime, if paid for the overtime, at no less than the legally required hourly rate.'

AF 58-59.[4] The CO then described the corrective action to be taken by the Employer to respond to NOF findings concerning this issue. AF 59.

Rebuttal. The Employer's rebuttal of September 30, 1996, argued that its combination of duties is "common in the residential care home industry" in "Stockton or California." As supporting evidence, the Employer claimed that the homes in Exhibit A "hired or [are] presently hiring caregivers who perform a combination of duties."[5] The Employer also argued that the job duties of a Nurse Assistant in the DOT "does not truly reflect the duties of a Caregiver in a Residential Care Home," contending that," The DOT no longer describe[s] the job typically existing in residential care homes or that no DOT designation comes close to describing the job of a caregiver because the caregiver's job has developed as a normal position in the industry or has developed probably even without the knowledge of the drafters of the DOT at the time of its drafting." The Employer appeared to admit there is no position called "caregiver" that is generally recognized when it said, "The caregiving occupation has not been given any recognition as can be read in the attached Exhibit B." AF 15.[6] To justify business necessity, the Employer then attached

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[4]The CO then pointed out that, "That sentence also indicates that the alien may be required to work overtime," indicating that the CO construed the terms of Employer's proposed Employment Contract as further evidence that it expect the duties of this position to involve overtime work.

[5]The Employer failed to include any such list, and the rebuttal contains nothing that is marked as "Exhibit A." The panel assumes that AF 18-43 is meant to be Exhibit A. Names of putative rest home facilities are given on many of these sheets, which predominantly refer to a job called "Caregiver." The meaning of this term is not otherwise given, and no position was found under this title in the Alphabetical Index of Occupational Titles in the DOT. The panel observes, however, that this collection of pages also appears to present examples of Residential Care Home workers who performed virtually identical duties under such job names as "Caregiver," "Manager/Caregiver," "Nurse Assistant," "Household Domestic Worker/Practical Nurse," "Caregiver/Housekeeper," "Staff Nurse," "Babysitter/Caregiver," "Nurse Assistant/Caregiver," "Caregiver/Household Domestic," and "Home Health Aide/ Caregiver." The pages seem to be extracts from random ETA 750B Forms previously filed as statements of aliens' experience in unidentified certification applications, which bear the signature of Ms. Sineng-Smith as "Agent." As such, these appear to be hearsay statements by Employer's attorney which required the support of statements by persons with knowledge of the facts in each case in order to constitute evidence. **Moda Linea, Inc.**, 90 INA 424 (Dec. 11, 1991); and see also **Hupp Electric Motors, Inc.**, 89 INA 478 (July 16, 1991)(*en banc*). As such statements are not part of this record the Rebuttal does not present an explanation and authoritative verification of these materials in the context of this case. Consequently, the weight these sheets merit as evidence is problematical

[6]While Employer cited its "Exhibit B," nothing appeared in the file with this label, as was noted *supra* regarding "Exhibit A." This probably was the magazine article that mentioned some owners' complaints about regulation by State and Federal administrative agencies charged with the oversight of residence care facilities.

copies of its payroll tax returns covering a number of years to prove its past hiring practices relative to this position. It argued further on "the basis of economic necessity," contending it would have to hire three persons to perform all of the duties that it requires of this worker. The Employer asserted that it had six residents in the facility and, after noting its income and the salary it would pay one or more "caregivers, " it concluded, "Therefore, hiring three persons separately will not be economically feasible for the employer." *Id.*

Final Determination. The CO denied certification in the Final Determination issued on December 31, 1996.[7] The CO concluded that the Employer's rebuttal was insufficient to establish as consistent with the regulations its restrictive requirements as to the combination of duties and as to its fingerprinting requirements under 20 CFR §§ 656.21(b)(2)(i)(A) and (B), and 656.21(b)(2)(ii).

The CO rejected the Employer's combination of duties for a Nurse Assistant, as it was inconsistent with the DOT definition of this position, repeating the comment in the NOF that a Nurse Assistant does not perform any job duties that involve the administration and execution of the food preparation functions , the various housekeeping chores, and the provision of security. The CO addressed and rejected as unsupported by any evidence the Employer's argument that the DOT "did not truly reflect the duties of a Nurse Assistant in a residential care home." The CO concluded, "Until such time as the DOT is changed, we are required to follow guidelines set forth in the existing DOT." The CO then found under 20 CFR § 656.21(b)(2)(i)(A) that the Employer had failed to prove that Nurse Assistants are normally required to be fingerprinted. The CO then discussed the text of the California State Regulation on which the Employer relied, observing that this provision did not make reference to Nurse Assistants. For these reasons the CO rejected the Employer's argument based on that State regulation as irrelevant in the context of this case, and the CO concluded that the Employer's rebuttal had failed to justify the fingerprinting requirement of its hiring criteria.

In denying certification, the CO concluded that the Employer failed to amend its job duties, and that its rebuttal did not provide the comprehensive documentation necessary to prove that in the past it normally employed persons for this combination of duties, that its workers customarily perform this combination of duties in the area of intended employment, or that this combination of duties is based on business necessity.
AF 13.

Appeal. On January 31, 1997, the Employer requested reconsideration of the CO's denial of alien labor certification and requested review. AF 02-10. The CO denied reconsideration, citing **Harry Tancredi**, 88 INA 441(Dec. 1, 1988)(*en banc*).

Discussion

[7] In summarizing the rebuttal, the CO accepted Employer's documentation of the overtime and Employment Contract issues, which thus were eliminated from the case.

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, its use of additional hiring standards and recruiting practices is limited by the Act and regulations when the employer applies such criteria and procedures to U. S. job seekers in the course of testing the labor market in support of an application for certification to hire an alien for the job at issue. The copies of State laws that the Employer attached to its request for reconsideration were not given any weight by the CO on reconsideration and cannot be made a part of the record in this appeal, as the Board has firmly held that the Employer cannot supplement the record on appeal. **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992); also see **ST Systems, Inc.**, 92 INA 279 (Sep. 2, 1993). Moreover, it is well established that evidence first submitted with the request for review will not be considered by the Board. **Memorial Granite**, 94 INA 066 (Dec. 23, 1994). As the Employer had a full opportunity to confront and to file evidence on all of the issues discussed in the NOF, the added evidence it filed with its appeal will be disregarded.

The purpose of 20 CFR § 656.21(b)(2) is to make the job opportunity available to qualified U. S. workers. Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the Dictionary of Occupational Titles or where the requirement is for a language other than English, involves a combination of duties, or provides that the worker must live on the premises, 20 CFR § 656.21(b)(2) requires employer to establish the business necessity for the requirement. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U. S. workers who may apply for or qualify for the job opportunity. **Venture International Associates, Ltd.**, 87 INA 569 (Jan. 13, 1989)(*en banc*).

In this context 20 CFR § 656.21(b)(2) must be applied with 20 CFR § 656.21(b)(1)(B)(ii).[8] To prove that a combination of duties is based on business necessity the Employer was required to demonstrate that it is necessary to have one worker perform the combination of duties in the context of Employer's business, including a showing of such a level of impracticability as to make the employment of two workers unfeasible. Assertions relating to either convenience or practicality are not enough to establish the business necessity of a combination of duties. **Robert L. Lippert Theatres,** 88 INA 433 (May 30, 1990) (*en banc*); **Jaclyn, Inc.**, 90 INA 210, 91 INA 342 (Oct. 31, 1991). Based on arguments in the Employer's brief, it is further relevant to observe in this case that neither proof that the Employer's scale of operation is insufficient to justify hiring more than one worker to perform the combined duties (**Steritech Group, Inc.,** 89 INA 018 (June 18, 1990), nor evidence that the combination of duties would produce financial savings for the Employer (**Chinese Community Center, Inc.,** 90 INA 099 (June 4, 1991), would be sufficient

[8] In applying these regulations the Board has reasoned that an employer is not allowed to treat an alien more favorably than it would a U. S. worker. **ERF, Inc., d/b/a Bayside Motor Inn**, 89 INA 105 (Feb. 14, 1990). Also see **International School of Dog Grooming**, 93 INA 300 (Oct. 4, 1995).

to establish business necessity. [9]

The Employer declined to amend its job duties in response to the NOF. In its Rebuttal, on the other hand, the Employer did not offer persuasive evidence (1) that it had employed persons for this combination of duties in the past, (2) that its workers customarily perform this combination of duties in the area of intended employment, or (3) that this combination of duties was based on its business necessity. AF 13. Moreover, the CO correctly inferred that in the absence of a comprehensive explanation connecting them to the work duties of the employees listed, the tax papers offered in the Rebuttal did not prove that either that the Employer had employed persons for this combination of duties in the past, or that Employer's workers usually performed this combination of duties in the area of intended employment. This lack of persuasive evidence made it necessary that the Employer present persuasive evidence supporting its arguments that its combination of duties was based on business necessity. **Robert Paige & Associates,** 91 INA 072, (Feb. 3, 1993); **Shaolin Buddhist Meditation Center**, 90 INA 395 (June 30, 1992).[10] The CO found that Employer's arguments that its combination of duties were either standard industry procedure or a business necessity were not supported by the evidence. **Gencorp**, 87 INA 659 (Jan.13, 1988)(*en banc*).

After examining the Employer's brief and the evidence of record, the Panel agrees that the CO's finding should be affirmed. Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is

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[9] It is elementary that counsel's unsupported conclusions, *i.e.*, statements without explanation or factual support, were correctly found by the CO to be insufficient to demonstrate that the Employer's job requirements are normal for a position or are supported by business necessity. **Inter-World Immigration Service**, 88 INA 490 (Sept. 1, 1989), citing **Tri-P's Corp.**, 88 INA 686 (Feb. 17, 1989).

[10] Merely enhancing Employer's business was insufficient to show the business necessity of the combined duties in Employer's application. **Phyllis Kind Gallery, Inc.**, 92 INA 423 (Oct. 11, 1994); **Broman Travco International, Inc.**, 90 INA 388 (May 21, 1992); **Midtown Legal Bureau, P. C.**, 92 INA 035 (Dec. 23, 1992).

not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.